In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 775

SCHOOL DISTRICT 151 OF COOK COUNTY, ILLINOIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is not yet reported. That court's earlier opinion (Pet. App. 15a-35a) is reported at 404 F.2d 1125. The opinions of the district court are reported at 301 F. Supp. 201 and 286 F. Supp. 786.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1970. The petition for a writ of cer-

tiorari was filed on September 30, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in light of the specific findings below that the school board had deliberately segregated both pupils and teachers on the basis of race in violation of the Constitution and laws of the United States, the board was properly required to adopt and implement a comprehensive plan of desegregation.

STATEMENT

This school desegregation suit was commenced by the United States on April 25, 1968, pursuant to Section 407(a) and (b) of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6(a) and (b). An amended complaint, filed on May 27, 1968, sought preliminary and permanent injunctive relief against racial segregation of students and faculty in School District 151, a six-school, elementary school system located in Cook County, Illinois.

On July 8, 1968, following a hearing on the government's application for a preliminary injunction, the district court in a detailed opinion found that the petitioners and their predecessors in office had deliberately segregated students and faculty on the basis of race, and entered an order for preliminary relief. *United States* v. *School District 151 of Cook County, Illinois*, 286 F. Supp. 786 (N.D. Ill.). On July 22, 1968, the district judge entered a supple-

mentary order which, among other things, required implementation of a comprehensive desegregation plan.

On December 17, 1968, the court of appeals, with one judge dissenting, affirmed the decision of the district court, including that court's preliminary injunctive order (Pet. App. 15a-35a). In view of the pendency of the government's motion for a permanent injunction, the court of appeals deemed it unnecessary to review the terms of the injunctive order in detail (Pet. App. 29a). It directed that a hearing on the request for permanent relief be held at the "earliest practical time"; that at the hearing both sides be allowed to call experts with respect to the several proposed plans of desegregation; and that there should be evidence "with respect to the factors of safety, convenience of pupils and parents, and costs to and resources of the School District" (Pet. App. 29a).[1]

The hearing lasted twenty-one days in January and February 1969. On May 15, 1969, the district court sustained the allegation of deliberate segregation of students and faculty and entered an order permanently enjoining the petitioners from engaging in racially discriminatory conduct, and requiring them to take specified affirmative steps designed to overcome the effects of their prior unlawful conduct. *United*

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[1] The court of appeals further stated that, in view of the district court's order of July 8, 1968, the Board would have the burden "of presenting a plan which 'promise[d] meaningful and immediate progress toward disestablishing' the existing unconstitutional discrimination, *Green* v. *County School Board*, 391 U.S. at 439 * * *" (Pet. App. 29a).

States v. *School District 151*, 301 F. Supp. 201 (N.D. Ill.). The plan of student assignment set forth in this order (301 F. Supp. at 235-236) was based upon a study of the district—conducted at the request of petitioners and the suggestion of the United States—by representatives of the United States Office of Education in accordance with Section 403 of the Civil Rights Act of 1964, 42 U.S.C. 2000c-2.

On September 8, 1970, the court of appeals, again with one judge dissenting, affirmed the order, with slight modification regarding the transfer of children in kindergarten through second grade (Pet. App. 1a-14a; compare 301 F. Supp. at 236 with Pet. App. 8a).

ARGUMENT

On the record developed at the extensive hearings, the courts below correctly held that petitioners had a constitutional obligation to take affirmative steps to overcome the effects of their prior discrimination. In its findings of fact and conclusions of law, the district court found specific racially discriminatory acts by petitioners in the areas of student assignment, student transportation, school site selection, school organization and grade structure, faculty and staff hiring, promotion and assignment (301 F. Supp. at 207-237). Despite these findings, which the court of appeals upheld, petitioners urge that this case raises the question of "racial imbalance stemming from residential housing patterns" (Pet. 13). This claim ignores both the explicit rationale of the decisions

below and the record on which those decisions were based.

As the court of appeals pointed out on the earlier appeal, there was substantial evidence to support the district court's conclusion that petitioners had "inherited from their predecessors a discriminatorily segregated school system which [petitioners] subsequently fortified by affirmative and purposeful policies and practices which effectually rendered de jure the formerly extant de facto segregation" (Pet. App. 22a). The court of appeals reaffirmed this view on the present appeal (Pet. App. 3a, n. 4.).

This case is thus wholly unlike the court of appeals' earlier decision in *Bell* v. *School City of Gary*, 324 F. 2d 209 (C.A. 7), certiorari denied, 377 U.S. 924, and similar decisions in the Sixth and Tenth Circuits upon which petitioners mistakenly rely.[2] The critical element in *Bell* was that the plaintiffs were challenging "a school system developed on the neighborhood school plan, honestly and conscientiously constructed with no intention or purpose to segregate the races * * *." 324 F.2d at 213. That is plainly not the situation here. It is true that the district court in the present case found that "[s]chool segregation, whatever the cause, has the effect of stigmatizing Negro pupils and retarding their educational develop-

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[2] See *Downs* v. *Board of Education of Kansas City*, 336 F. 2d 988 (C.A. 10), certiorari denied, 380 U.S. 914; *Deal* v. *Cincinnati Board of Education*, 369 F. 2d 55 (C.A. 6), certiorari denied, 389 U.S. 847. But see *Branche* v. *Board of Education of Hempstead*, 204 F. Supp. 150 (E.D. N.Y.); *Hobson* v. *Hansen*, 269 F. Supp. 401 (D.D.C.), affirmed, 408 F. 2d 175 (C.A.D.C.).

ment." 286 F. Supp. at 788; see 301 F. Supp. at 205. The court held, however, that such harm is magnified and constitutionally impermissible when, as here, the "seeds of prejudice" are "nourished by the deliberate practice of segregation." 301 F. Supp. at 206. This is no more than a restatement of this Court's holding in *Brown I* that "[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children," and "[t]he impact is greater when it has the sanction of the law * * *." *Brown* v. *Board of Education*, 347 U.S. 483, 494.

Unlike most school desegregation cases which have come before this Court,[3] this case arose in a jurisdiction with no recent history of legally mandated dual school systems; but this is, of course, constitutionally irrelevant. Under the Fourteenth Amendment, no school board may segregate schools by employing racially discriminatory devices of any kind. And where such de jure segregation exists the board is under a constitutional obligation to act affirmatively to bring about "[t]he transition to a unitary, nonracial system of public education." *Green* v. *County School Board*, 391 U.S. 430, 436. See *Taylor* v. *Board of Education*, 191 F. Supp. 971 (S.D. N.Y.), affirmed, 294 F. 2d 36 (C.A. 2), certiorari denied, 368 U.S. 940; *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501 (C.D. Cal.); *Dowell* v. *School Board of Oklahoma City*, 219 F. Supp. 427 (W.D.

[3] But see *Taylor* v. *Board of Education*, 191 F. Supp. 181 (S.D. N.Y.), affirmed, 294 F. 2d 36 (C.A. 2), certiorari denied, 368 U.S. 940.

Okla.); *id.*, 244 F. Supp. 971 (W.D. Okla.), affirmed, 375 F. 2d 158 (C.A. 10); *United States* v. *Board of Education, Independent School District No. 1, Tulsa,* No. 338-69 (C.A. 10, July 28, 1970). The decisions below merely reaffirm this settled constitutional principle.

Petitioners' reliance (Pet. 24-25) upon Sections 401(b) and 407(a) of the Civil Rights Act of 1964 is misplaced. Those provisions are not prohibitions; they merely make explicit that the Act does not confer the authority specified if it would not otherwise exist. Their purpose was to make clear that the 1964 Act did not grant to federal officials or courts the power to require remedial action by school systems which were already in compliance with the Fourteenth Amendment. See, *e.g.*, *United States* v. *Jefferson County Board of Education,* 372 F.2d 836, 878-886 (C.A. 5), affirmed on rehearing, 380 F.2d 385 (C.A. 5) (en banc), certiorari denied *sub nom. Caddo Parish* v. *United States,* 389 U.S. 840; *United States* v. *School District 151,* 286 F. Supp. 786 (N.D. Ill.), affirmed, 404 F.2d 1125 (C.A. 7); *Spangler* v. *Pasadena City Board of Education, supra*; *Keyes* v. *School District Number One, Denver, Colo.,* 303 F. Supp. 289 (D. Colo.); *Swann* v. *Charlotte-Mecklenburg Board of Education,* No. 14,517 at 20-21 (C.A. 4, May 26, 1970), pending before this Court, Nos. 281, 349, this Term. See, also, 110 Cong. Rec. 1518, 1598, 12714, 13820 (1964). Since, as we have shown, this case does not involve the issue whether purely adventitious, de facto segregation gives rise to remedial obligations under the Fourteenth Amendment, the pro-

visions of the Civil Rights Act are inapplicable here.[4]

In short, when properly viewed as involving de jure segregation and the remedies necessary to achieve a constitutional school system, the decision below neither conflicts with that of any other court of appeals nor raises any new questions.

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[4] Petitioners also contend that the procedures and evidentiary standards utilized below were improper. They claim, specifically, that the district court erred in imposing upon them the burden of dispelling an inference of discrimination which the court held arose from certain of the evidence (Pet. 18-20) but see *Turner* v. *Fouche*, 396 U.S. 346; *United States* v. *Sheet Metal Workers*, 416 F.2d 123, 127 n. 7 (C.A. 8); that the court improperly relied upon the testimony of various past and present school officials in reaching its conclusion that the school board's policies violated the Constitution (Pet. 15-18) but see *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 231; *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La.), affirmed, 389 U.S. 571; that the district court erred in adopting the government's proposed findings (Pet. 20) but see *In Re Woodmar Realty Company*, 307 F. 2d 591, 593-594 (C.A. 7); *Bradley* v. *Maryland Casualty Co.*, 382 F. 2d 415, 422-424 (C.A. 8); and that the court of appeals was incorrect in relying upon the "clearly erroneous" doctrine as its standard for review (Pet. 21) but see *Zenith Corporation* v. *Hazeltine*, 395 U.S. 100, 123. These are similar objections (see, *e.g.*, Pet. 20-21) were found by the court of appeals to be "unworthy of discussion" (Pet. App. 3a). These subsidiary matters were thus examined and rejected by the courts below and provide no sound basis for invoking the certiorari jurisdiction of this Court. See, *e.g.*, *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393; *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 77-79.

CONCLUSION

The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JERRIS LEONARD,
Assistant Attorney General.

JOSEPH B. SCOTT,
Attorney.

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